

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

The Board has previously determined claimant established a direct link between his current condition and a workplace accident or occupational disease. At the first preliminary hearing, which was held in July 2003, claimant introduced a February 20, 2003 letter from Dr. Gerald R. Kerby, a professor in the Division of Pulmonary Diseases and Critical Care Medicine with the University of Kansas Medical Center. After reciting claimant's lengthy medical history, which includes both preexisting asthma and smoking, the doctor concluded claimant's occupational exposure to certain chemicals contributed to his moderate and persistent asthma. The doctor wrote, in part:

In my best judgment, the course of his asthma is probably moderate and persistent. I would estimate his impairment using AMA criteria at approximately class 2 (25%). Of that 25% impairment I would assign 10% (2.5%) to the effects of occupational exposure to substances at Boeing Corporation and 90% (22.5%) to the effects of genetically caused asthma, non-occupational allergens and irritants, recurrent respiratory infections, poor therapeutic compliance and smoking.¹

Respondent and its insurance carrier argue claimant's asthma and present need for medical treatment are related to smoking and his failure to comply with medical treatment. In support of that argument, they presented the testimony of a private investigator, Rob Killingsworth, who videotaped claimant smoking.

At the November 2003 preliminary hearing, neither party presented any medical opinion that challenged Dr. Kerby's conclusions that claimant's moderate and persistent asthma was caused, at least in part, by an exposure to chemicals at work. At this juncture, the Board finds no reason to disturb its earlier finding that claimant has established his current condition is related to either an occupational disease or an accident at work. Accordingly, the December 11, 2003 Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.²

WHEREFORE, the Board affirms the December 11, 2003 preliminary hearing Order.

¹ P.H. Trans. (July 1, 2003), Cl. Ex. 1 at 3.

² K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director